Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

SALLY FERNANDES,

Petitioner,

v.

VIACOM, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF DELAWARE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This Court has held that, in class actions, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that the named plaintiff adequately represent the class *at all times*, including, as other appellate courts have made clear, during settlement negotiations. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

In the present case, which is a class action, the Delaware Supreme Court held — in a decision that reached a view of what the Due Process Clause requires contrary to the decisions of several of the United States Courts of Appeals — that the named plaintiff adequately represented the class during settlement negotiations even though he was not involved in the settlement discussions, but instead was "notified" of the settlement about the time it was reached. The Delaware Supreme Court further did so notwithstanding that the named plaintiff never consulted with the attorney who negotiated the settlement, and notwithstanding that the attorney who negotiated the settlement testified that he did not even know the named plaintiff's name.

The question petitioner proposes to present for review, should certiorari be granted, is whether, in such circumstances, the named plaintiff can have adequately represented the class as required by the Due Process Clause.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The following were the parties to the proceedings in this case in the Delaware courts: Len Fernandes, Sally Fernandes, Eugenia Gladstone Vogel, Anthony Moratta, Rebecca Siegel, Anne Klein, Joan Otto, Frank Pernice, Virginia Rosenberger, Leonard Ganz, Lauren Carey, Sam Wiechner, Claire Rand, Palmetto Partners LP, Naline Yassin, Yehuda Glatzer, Howard Gunty Profit Sharing Plan, Howard L. Milkis, Michael Shaw, Mike Taylor, Linda Juarez, Anne-Pezza Fiorillo, David T. McLaughlin, William S. Levine, Arturo R. Moreno, Bruce S. Gordon, Jeffrey Sherman, George H. Conrades, Robert Downs Walter, Mel Karmazin, Farid Suleman, Sumner Redstone, Infinity Broadcasting Corporation, and Viacom, Inc.

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Petitioner, Sally Fernandes, respectfully petitions for a writ of certiorari to review the judgment of the Delaware Supreme Court in this case.

OPINIONS BELOW

The opinion of the Delaware Supreme Court which petitioner seeks to have this court review is reproduced in the Appendix at 1a and is reported at *In re Infinity Broadcasting Corp. Shareholders Litig.*, 802 A.2d 285, 2002 Del. LEXIS 408 (2002) (*per curiam*). The opinion of the Delaware Court of Chancery is reproduced in the Appendix at 21a, and is not reported.

STATEMENT OF JURISDICTION

Jurisdiction is proper in this court. The judgment sought to be reviewed is contained in an opinion of the Delaware Supreme Court filed June 27, 2002. No rehearing was sought.

The present Petition for Writ of Certiorari is filed within 90 days of the Delaware Supreme Court's June 27, 2002 decision, and is timely pursuant to 28 U.S.C. § 2101(c). Petitioner invokes this court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved in this case is the Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution. It provides:

> **Amendment XIV**
>
> **Section 1** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This action is a consolidation of numerous non opt out class actions brought in the Delaware Court of Chancery within hours of the August 15, 2000 public announcement by Viacom, Inc. ("Viacom") of an offer to acquire all of the Class A shares of Infinity Broadcasting Corporation ("Infinity") that it did not already own in a stock for stock merger transaction. These actions were brought on behalf of a Chancery Court Rule 23(b)(2) non opt out class of Infinity shareholders[1] and against Infinity and its directors (as well as Viacom) notwithstanding the fact that Infinity and its directors had not had time to even consider the Viacom offer, let alone accept or reject it.

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1. Chancery Court Rule 23 is identical in all relevant respects to Federal Rule of Civil Procedure 23.

By agreement of counsel, the first two lawyers to file suit were named "lead" or "general" counsel, and one of them, Arthur N. Abbey, proceeded to negotiate a settlement of the action based upon an increase in the stock for stock exchange ratio that (as described in defendants' filings with the Securities and Exchange Commission) had been negotiated entirely by Infinity's board and that (due to an intervening decline in the price of Viacom stock) resulted in class members (Infinity's public shareholders) receiving *less money* than they would have received under the original Viacom offer.[2] The settlement also provided for a multimillion-dollar attorneys' fee for Mr. Abbey and his co-counsel, and provided for the release of all absent class members' claims, known and unknown, against all defendants.

Petitioner Sally Fernandes intervened in the Delaware Chancery Court in January 2001, and objected to the settlement.[3]

---

2. That Mr. Abbey was the attorney who negotiated the settlement is clear from the deposition testimony of his co-lead counsel, Steven Schulman, who testified as follows:

> Q Were you involved in the settlement negotiation?
>
> A As allied counsel, with Mr. Abbey and I knew of, or what was directly involved in such discussion. Although I wasn't a direct participant in such communication, Mr. Abbey was a direct participation in every such communication but we did obviously definitely as a team.

Relevant portions of Mr. Schulman's deposition testimony are reproduced in the appendix at 35a.

3. Petitioner Sally Fernandes' son, Len Fernandes, was the original intervener, but he subsequently died and petitioner succeeded to his ownership interest and was substituted as a party in his stead by Order of the Delaware Supreme Court dated June 18, 2002. *See* App. at 2a n.1; *In re Infinity Broadcasting Corp. Shareholders Litig.*, 802 A.2d at 288 n.1.

Petitioner objected on a number of grounds. However, the objection that is relevant for purposes of this petition is her objection that the named plaintiff did not adequately represent her and other class members as required by the Due Process Clause because he was not involved in the settlement discussions, but instead was "notified" about the settlement about the time it was reached. Further, the named plaintiff never consulted with Mr. Abbey, the attorney who negotiated the settlement, and indeed, Mr. Abbey did not even know the named plaintiff's name. This was conclusively established by Mr. Abbey's deposition testimony, which is reproduced in the appendix and was in pertinent part:

> Q Mr. Abbey, who is your client in this litigation?
>
> A . . . I don't know that I know, the name as I sit here today of our client that our firm represents. I am not sure that I recall.
>
> * * *
>
> Q Did the client review the Complaint or any files at any time?
>
> A I don't know.
>
> Q How many times have you spoken with the client about this case?
>
> A To my knowledge, never.
>
> Q Has the client been consulted on settlement by you or anyone representing the class?

> A Not by me, but I don't know the answer to that question.

Appendix at 33a-34a.

Fernandes explicitly raised this constitutional law issue in her brief objecting to the settlement in the Delaware Chancery Court. Petitioner also explicitly raised this constitutional law issue on her appeal to the Delaware Supreme Court at pages 14-15 of her opening brief and pages 12-13 of her reply brief.

The Delaware Supreme Court addressed the issue in its opinion as follows:

> Although Fernandes cites deposition testimony taken from class counsel that suggests limited contact and substantially passive involvement by certain named plaintiffs, a nominal plaintiff's lack of personal familiarity with an action is not determinative of that representative's adequacy. Our case law requires little more than that a representative be generally familiar with the litigation. Indeed, our legal system has long recognized the appropriateness of an attorney taking the dominant role in derivative proceedings. Therefore, the mere fact that class counsel undertook the dominant role in this litigation in no way suggests that the class representatives must be found to have inadequately represented the class.

See App. at 9a-10a; *In re Infinity Broadcasting Corp. Shareholders Litig.*, 802 A.2d at 291.

REASONS FOR GRANTING THE PETITION

Petitioner respectfully submits that certiorari should be granted for at least three reasons. First, the appellate courts of this country have reached conflicting decisions as to what role the Due Process Clause requires the named plaintiff in a class action to undertake in representing the interests of absent class members. Second, because of the nature of class actions, which almost invariably entail absent class members with relatively small financial stakes in the litigation, there are few cases in which an objector will have the desire or financial incentive to pursue certiorari and to thereby give this court an opportunity to resolve this important constitutional issue on a national level. Third, and finally, this petition presents an issue of public importance, inasmuch as there has been much public criticism to the effect that many class action lawsuits are driven by plaintiffs' lawyers for their own benefit. A decision by this court establishing a national standard as to what role a class representative must play in litigating a representative lawsuit would thus play an important role in maintaining public confidence in our legal system.

A. The Appellate Courts of the Country Have Reached Contrary Conclusions as to What Role a Named Plaintiff Must Play in Representing the Interests of Absent Class Members

This court has made clear that "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Since then it has been clear that this requirement necessarily applies during settlement negotiations.[4]

4. *See In re California Micro Devices Securities Litig.*, 168 F.R.D. 257, 260-61 (N.D. Cal. 1996) (collecting cases).

Since *Shutts*, however, the appellate courts of this country have come to divergent conclusions as to what is meant by "adequately represent." Here, as noted, the Delaware Supreme Court held that "a nominal plaintiff's lack of personal familiarity with an action is not determinative of that representative's adequacy," and that "our legal system has long recognized the appropriateness of an attorney taking the dominant role in derivative proceedings." App. at 9a-10a; *In re Infinity Broadcasting Corp. Shareholders Litig.*, 802 A.2d at 291.

Several of the United States Courts of Appeals are in accord with the Delaware Supreme Court. *See, e.g., Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985) ("The adequate representation requirement involves questions of whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation, and of whether plaintiffs have interests antagonistic to those of the rest of the class"). *See also In re Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 462-63 (9th Cir. 2000) (similar); *Lewis v. Curtis*, 671 F.2d 779, 789 (3d Cir.) (similar), *cert denied*, 459 U.S. 880 (1982).

Other of the United States Courts of Appeals have held to the contrary. For example, in *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 481-83 (5th Cir. 2001), the Fifth Circuit held as follows:

> Even more unsettling is that the district court's presumption ignores the Constitutional dimensions of the adequacy requirement, which implicates the due process rights of all members who will be bound by the judgment . . .
>
> * * *

> As an initial matter, we articulate the adequacy standard outside of any specific statutory context.
>
> * * *
>
> We have described the adequacy requirement as one that mandates an inquiry into the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees . . . [The Due Process Clause] require[s] the class representatives to possess a sufficient level of knowledge and understanding to be capable of 'controlling' or 'prosecuting' the litigation.

Id. at 481-83.

The Second and Seventh Circuits are generally in accord. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077-78 (2d Cir. 1995) ("class certification may properly be denied where the class representatives have so little knowledge and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys"); *Rand v. Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991) ("the named plaintiff must have some commitment to the case, so that the representative in a class action is not a fictive concept"). *See also* 5 Moore's Federal Practice § 23.25[4][c][ii] (3d ed. 1997) ("Although counsel normally has a substantial influence on the course of class litigation, the class representative may not completely abdicate conduct of the case to counsel and must at least minimally supervise class counsel").

Petitioner respectfully submits that this court should grant certiorari to resolve this dispute among the nation's appellate courts as to what responsibilities the Due Process Clause requires class representatives to undertake in representative actions.

B. Because of the Nature of Class Actions, Which Almost Invariably Entail Absent Class Members With Relatively Small Stakes in the Litigation, There are Few Class Actions in Which an Objector will have the Desire or Financial Incentive to Pursue Certiorari and to Thereby give this Court an Opportunity to Resolve this Important Constitutional Issue on a National Level

Additionally, petitioner respectfully submits that this Court should take cognizance of the fact that most class actions involve absent class members with relatively modest stakes in the litigation. *See, e.g., In re American Reserve Corp.*, 840 F.2d 487, 490 (7th Cir. 1988) (discussing issue generally).

Thus, there will necessarily be few class actions in which an objector will have the desire or financial incentive to pursue certiorari and thereby create the opportunity for this court to resolve the important question of what degree of involvement the Due Process Clause requires named plaintiffs in class or representative actions to exercise. As such, should the court not grant certiorari in the present case, it could be many years before another opportunity to hear the issue arrives, and before the Courts and litigants of this country will have this important constitutional law issue resolved on a national level. Petitioner respectfully submits that this constitutes another reason why her petition for certiorari should be granted.

C. This Petition Presents an Issue of Public Importance Since There has Been Much Public Criticism to the Effect that Many Class Action Lawsuits are Driven by Lawyers for Their own Benefit, and a Decision by this Court Establishing a National Standard for the Due Process Clause Obligations of Class Representatives is Important to Maintaining Public Confidence in our Legal System

Finally, petitioner respectfully submits that her petition presents an issue of public importance since in recent years there has been significant public criticism to the effect that many class action lawsuits are driven for the benefit of the plaintiffs' bar, not class members. *See, e.g., Lead Institutional Plaintiff Withdraws From Litigation Against Pre-Paid Legal, Litigant Declares Its Participation Was Unintentional and States Suit is Without Merit*, PRNewswire-First Call, August 15, 2002; Jason Honnin, *Florida Judge Compares Milberg Weiss Action to Squeegee Boy*, The Recorder, April 17, 2002; Peter Elkind, *The King of Pain is Hurting*, Fortune, September 4, 2000; Karen Donovan, *Another Fine Mess for Milberg*, National Law Journal, Jan. 31, 2000.

Given the significant public interest in the issue, petitioner respectfully submits that this court would render a significant contribution to the goal of maintaining public confidence in our legal system were it to grant certiorari and establish a national standard for the Due Process Clause obligations of named plaintiffs in class actions and other representative litigations.

CONCLUSION

For all of the foregoing reasons, petitioner Sally Fernandes respectfully petitions this Court to grant a writ of certiorari to the Supreme Court of Delaware.

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF DELAWARE DATED AND DECIDED JUNE 27, 2002

IN THE SUPREME COURT OF THE
STATE OF DELAWARE

No. 594, 2001, 595, 2001
Consolidated

IN RE
INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

Court Below: Court of Chancery
of the State of Delaware in
and for New Castle County
C.A. No. 18219

Submitted: April 17, 2002
Decided: June 27, 2002

Before **WALSH, HOLLAND** and **STEELE**, Justices.

Upon appeal from the Court of Chancery. **AFFIRMED.**

In October 2001, the Court of Chancery approved a settlement reached between Appellees, defendants-below, Infinity Broadcasting and Viacom, Inc. and Appellees, plaintiffs-below, Infinity shareholders in response to litigation challenging the fairness of a tender offer by Viacom. Before the merger, Viacom owned approximately 64 percent of the outstanding equity in Infinity. In August 2000, Infinity announced that Viacom had offered to acquire the remaining

shares of Infinity common stock in return for Viacom common stock. The proposed exchange ratio was 0.564 shares of Viacom stock for each share of Infinity stock.

Almost immediately after the announcement, a number of Infinity's minority stockholders filed eleven separate actions in the Court of Chancery, each challenging the fairness of the Viacom offer. In addition, several similar suits were filed in other jurisdictions, including two suits filed by Appellants, intervenors-below, Linda Juarez and Anne M. Pezza-Fiorillo in the New York Supreme Court for New York County, which is the principal place of business for both Infinity and Viacom. Although the Delaware cases were consolidated into a single action, Juarez and Pezza-Fiorillo chose not to intervene here until they filed their challenge to the Court of Chancery's approval of a settlement of the consolidated suit and their petition for a portion of the Chancellor's award of attorneys' fees. The latter is at the heart of the appeal before us.

Less than three months after the announcement of the offer, the Delaware plaintiffs entered into a global settlement with Infinity on behalf of a class consisting of Infinity shareholders. Appellant, objector-below, Len Fernandes[1] objected to the settlement in the Court of Chancery on the grounds that its terms were unfair and tainted by inadequate class representation. He now appeals the Chancellor's

1. By order of this Court dated June 18, 2002 and pursuant to Supreme Court Rule 31, Sally Fernandes has been substituted for Appellant, objector-below, Les Fernandes in the above captioned appeal.

decision overruling his objection. Appellants Juarez and Pezza-Fiorillo raise a separate issue on appeal, namely that the Chancellor erred in his allocation of an award of 2.25 million dollars in attorneys' fees to counsel appearing in the Delaware Action. Juarez and Pezza-Fiorillo contend that they conferred a substantial benefit to the class as a result of their prosecution of the New York litigation and that the Chancellor wrongly denied their counsel a share of that award. After considering those arguments, we find that the Chancellor based his decision on the correct interpretation and application of Delaware law and that his factual findings have ample support in the record. Therefore, we affirm the judgment of the Court of Chancery.

The Delaware Action and Settlement

After Infinity shareholders filed eleven substantially identical complaints in the Court of Chancery, the court quickly consolidated the separate suits into a single action.[2] Each of these putative class actions alleged that Infinity, its board of directors, and Viacom breached their respective fiduciary duties of loyalty and care arising out of the factual assertion that the amount of Viacom stock offered as consideration for the merger was inadequate. In each instance, the proposed class consisted of all holders of Infinity common stock, excluding, of course, the defendants. The plaintiffs sought to enjoin the merger and to recover both compensatory and punitive damages, as well as attorneys' fees and costs. Once the court had consolidated the cases, the Chancellor appointed the law firms of Milberg Weiss Bershad Hynes &

2. Hereinafter the "Delaware Action."

Lerach, LLP and Abbey Gardy & Squitieri as co-lead counsel and the Delaware firms of Chimicles & Tikellis and Rosenthal Monhait Gross & Goddess, P.A. as co-liaison counsel to oversee the prosecution of the Delaware Action.

Concurrent to the litigation, and similarly in response to Viacom's offer, Infinity appointed a special committee of independent directors to provide recommendations to its board of directors concerning the proposed merger and to conduct any necessary negotiations with Viacom's representatives. The record reveals that the special committee and Viacom engaged in extensive talks concerning the terms of the tender offer. Among the most highly contested issues was the exchange ratio, which the special committee actively sought to increase. Class counsel in the Delaware Action also engaged in negotiations with Viacom's representatives concerning the need for an increase in the exchange ratio as part of any potential settlement. In late October, Delaware counsel reached a settlement with the defendants that, *inter alia*, increased the exchange ratio from the 0.564 shares of Viacom stock it proposed at the outset of its bid to 0.592 shares per Infinity share. During that same period of time, the special committee and Viacom's representatives were reaching an identical resolution. On October 30, 2000, on the advice of its financial advisors,[3] the committee voted to recommend that the Infinity board of directors approve the merger at the same exchange ratio of 0.592 shares of Viacom

3. At an October 30, 2000 special committee meeting, the financial advisors informed the committee that they believed the negotiated exchange ratio to be fair, from a financial point of view, to the non-Viacom holders of outstanding Infinity Class A common stock. They later confirmed these opinions in writing.

stock per Infinity share. Shortly thereafter, the parties to the Delaware Action presented the settlement to the Court. In turn, the Chancellor approved it.

The Fernandes Objection

Initially, we address Appellees' contention that Appellant Fernandes lacked standing to object to the settlement in the Court of Chancery. The transcript of the settlement hearing indicates that the parties chose not to present the issue of standing to the Chancellor during that proceeding. Although class counsel stated for the record that he was unwilling to concede Fernandes' standing, he admitted that the trial court did not necessarily need to decide the issue. Because counsel did not pursue the issue at that hearing and the record reveals no further inquiry into the standing issue, we find that it was not fairly presented to the Court of Chancery for decision. This Court generally will not address the merits of any issue not presented to the trial court and we find no compelling reason to depart from that standard in our consideration of this appeal.[4]

Any decision of the Court of Chancery regarding the fairness of a proposed settlement is within the discretion of that court and requires an application of its own business judgment.[5] This Court will review a decision regarding fairness only to the limited extent of determining whether "the findings and conclusions of the trial judge are supported by the record and [are] the product of an orderly and logical

4. Supr. Ct. R. 8.

5. *Rome v. Archer*, 197 A.2d 49, 54 (Del. 1964).

deductive process, [if so] they will be accepted."[6] We will not substitute our own business judgment for that of the Court of Chancery.[7] Fernandes contends that the Chancellor abused his discretion by approving a settlement that was unfair to the articulated class of Infinity shareholders. His principal argument rests on the notion that close scrutiny of the facts in the record reveals that the settlement provided nothing more than an illusory benefit that failed to adequately protect the rights of the class members. Specifically, he claims that this Court should hold that the illusory benefit is insufficient to extinguish the individual claims of members of the class and that it also precludes the Chancellor's award of any substantial attorneys' fees.

Fernandes argues that this Court need not look farther than the actual monetary value of the Viacom shares to find that alleged benefit to be, in essence, a sham. Because of a dramatic drop in the price of Viacom stock after the tender offer was announced, the actual cash value for Infinity's stockholders at the time of settlement was significantly reduced. In turn, he contends, this should have triggered an increase in the exchange ratio to maintain the cash-equivalent benefit conveyed to the stockholders.[8] This would be a

6. *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986) (citing *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).

7. *Rome*, 197 A.2d at 54.

8. It is apparent from the record that the terms of the offer were not subject to an adjustment that would require a change in the exchange ratio to reflect the ongoing price of Viacom stock. Even if there had been, the record reveals that a general dip in the market similarly devalued Infinity and other companies.

persuasive argument, however, only if we were to consider the cash price at settlement to be the proper measure of the benefit conferred in a challenged stock-for-stock merger. In fact, our courts have found that the Court of Chancery need not limit itself to an examination of the immediate tangible results to a corporation or its shareholders in determining the fairness of a settlement agreement.[9] The probable long-term benefits of the settlement are also properly considered.[10] Indeed, mergers like that at issue in this appeal are undertaken primarily in the anticipation of long-term benefits. Assuming a rational decision-making process, Viacom would only have tendered its offer for outstanding Infinity stock if it believed that the merger would produce a net increase in value. A short-term fluctuation in stock price does nothing to alter this extended outlook. Moreover this is a benefit that Infinity shareholders can reasonably expect to reap as new holders of Viacom stock. Therefore, it could fairly be concluded that the increase in the number of Viacom shares allotted to each class member as a result of the settlement produces a long-term benefit even where there is no triggered increase in the exchange ratio to reflect an updated market price fluctuation.

Having established that the benefit received by the increase in stock ratio as a result of negotiation was more than illusory, we now turn to the question of whether the terms of this settlement should properly include an award of attorneys' fees. As Fernandes is quick to point out, the timeline in the record shows that the Infinity special

9. *Prince v. Bensinger*, 244 A.2d 89, 95 (Del. Ch. 1968).

10. *Id.*

committee actively advocated an increased exchange ratio at the same time that class counsel sought an increase in the exchange ratio in the Delaware Action. The inference he suggests we must draw from this fact is that the special committee's work solely resulted in the benefit to the Infinity shareholders and that class counsel's efforts can fairly be considered redundant, insignificant or superficial. This disregards our well-established case law that, in the absence of evidence that the litigation did not result directly in a cognizable benefit to the class, we recognize a presumption that there is a causal relationship between the benefit and a timely filed suit.[11] Moreover, the settlement stipulation in the case at bar specifically states that Viacom "took into account the desirability of satisfactorily addressing the claims asserted in the [Delaware] Action in agreeing to increase the consideration to be conveyed to Infinity's public stockholders . . . and as such the Action was a positive contributing factor in Viacom's decision to increase the Merger consideration." Even though this suggests that the Delaware Action was only a partial cause of the benefit received as a result of the increase, counsel applying for attorneys' fees do not need to show that they were the sole cause of a benefit conferred by settlement in order to have earned a fair, adequate and reasonable fee for their work on behalf of the class.[12]

Fernandes also appeals the Chancellor's determination that the named plaintiffs adequately represented the class as

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11. *McDonnell Douglas Corp. v. Palley*, 310 A.2d 635 (Del. 1973)

12. *In re Resorts Int'l S'holders Litig.*, Del. Ch., Civ. A. Nos. 9470, 9605, 1990 WL 154154, Hartnett, V.C. (October 11, 1990).

required by Court of Chancery Rule 23(a)(4) and implied in Rule 23.1.[13] We have held that the Court of Chancery's determination of the adequacy of a class representative is an "essential component" of the settlement approval process.[14] The Chancellor clearly addressed this issue both from the bench and in his final order approving the settlement, explicitly stating that the shareholder class had been adequately represented. Although Fernandes cites deposition testimony taken from class counsel that suggests limited contact and substantially passive involvement by certain named plaintiffs, a nominal plaintiff's lack of personal familiarity with an action is not determinative of that representative's adequacy.[15] Our case law requires little more than that a representative be generally familiar with the litigation.[16] Indeed, our legal system has long recognized the appropriateness of an attorney taking the dominant role in derivative proceedings.[17] Therefore, the mere fact that class

13. *See Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d at 1039, 1045 (Del. 1996) (Rule 23.1 includes an implicit requirement that the named plaintiffs in a settlement class have adequately represented the class as a whole).

14. *Id.*

15. *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126 (Del. Ch. 1999)

16. *Id.*

17. *Id.* In fact, as the Chancellor noted in *In re Fuqua Indus.*, allowing private attorneys to bring suits on behalf of nominal shareholder is vital to the functioning of our partially privatized enforcement mechanism for policing fiduciaries. *Id.*

counsel undertook the dominant role in this litigation in no way suggests that the class representatives must be found to have inadequately represented the class. We find that sufficient evidence exists in the record to support the Chancellor's conclusions on the adequacy of the named plaintiffs' representation.

The Challenge to the Award of Attorneys' Fees

Juarez and Pezza-Fiorillo, on the other hand, do not, in this appeal, challenge the adequacy of the settlement or an award of fair, adequate and reasonable fees. Instead, they claim that the Chancellor erred as a matter of both law and fact by failing to assign or allocate a portion of the attorneys' fees actually awarded to counsel who solely participated in the New York litigation. Appellants first contend that the Chancellor based his ruling on an inaccurate interpretation of Delaware law. Juarez and Pezza-Fiorillo argue that the Chancellor ruled as a matter of law that only counsel who litigated before him in the Court of Chancery were entitled to a portion of the attorneys' fees, regardless of any benefit that may have been conferred by actions pursued in other jurisdictions. We fully agree that, had the Chancellor, in fact, ruled as alleged by Appellants, he would have incorrectly stated the law. Counsel pursuing litigation in any jurisdiction is entitled to a share of attorneys' fees in a settlement of a Delaware action if their efforts elsewhere conferred a benefit realized as part of the Delaware settlement.[18] Nevertheless, we do not read

18. *See, e.g., Sanders v. Wang*, Del. Ch., 2001 WL 599901, C.A. No. 16640, Steele, V.C. (May 29, 2001) (let.op.) (denying attorneys fees to counsel who filed suit in New York on grounds that the New York action failed to contribute to the beneficial results of the Delaware litigation).

the Chancellor's final order and remarks from the bench to be an asserted deviation from or variation on a well-established principle of our corporate law. We find it clear on this record that the basis for his ruling that New York counsel would not share in the fee award was not because they had failed to appear in the Delaware Action, but because the New York litigation neither promoted or influenced the global settlement in any meaningful way nor resulted directly in any benefit to the shareholder class.

We do not assign the same importance as Juarez and Pezza-Fiorillo to the Chancellor's comment from the bench that the only way counsel can be *assured* of a part of the award is to appear before the Court of Chancery and petition to become class counsel or co-counsel in Delaware litigation. Indeed, this is hardly a new statement of law. Instead we read it simply as a common sense statement of a readily observable fact, specifically intended for the *future reference* of counsel to whom he was denying fees. At no point does the Chancellor suggest that this was the basis for his decision. He merely voiced the rather obvious reality that the only *sure* way for *any* judge to know if, and to what extent, counsel have conferred a benefit in shareholder litigation is if they have actively appeared in front of him throughout the litigation. This in no way excludes any proper application for fees, including those arising from litigation in other fora, so long as counsel can substantiate that their involvement and efforts in other litigation resulted in a benefit to the class derived from the settlement.

Juarez and Pezza-Fiorillo allege that the language of the Chancellor's cover letter to his final order supports their

claim that the Chancellor misstated the law. The single sentence to which they point in that brief letter states: "If New York counsel want to apply for counsel fees in the New York cases, that is up to them." First, we note that the cover letter accompanying an order is hardly the definitive place for a party to seek the legal underpinnings of a judge's ruling, especially when that actual ruling can be found in a detailed written order, supplemented by extensive comment from the bench on the ruling. To avoid other misguided inferences that some might seek to draw from the Chancellor's statement, we restate that our law allows counsel pursuing litigation in other jurisdictions to seek attorneys' fees in Delaware so long as their efforts elsewhere have conferred a benefit that contributed to the settlement of similar suits here. Here, the suggestion that the Chancellor ruled that the New York court was the sole forum in which counsel litigating there could seek a fee award is misleading. We conclude in light of the record in this case and the Chancellor's comments both from the bench and in his final order, that he neither based his ruling upon the premise asserted by Juarez and Pezza-Fiorillo, nor did he intend that the parties consider it to be the law of the case.

This Court cannot state with any assurance what prompted the Chancellor's almost tangential comment in that letter. However, we can speculate that it was in part a result of the frustration that accompanies chimeric claims for awards of attorneys' fees. As we discuss *infra*, counsel for Juarez and Pezza-Fiorillo offered no substantial evidence to support their claim that they conferred a benefit on the class by positively affecting the settlement in Delaware which could entitle them to an allocation of the fee award. Despite

invitations to join the Delaware litigation and represent the interests of their clients before the Court of Chancery, counsel chose not to intervene until the time arose to allocate a fee. While our courts welcome the intervention of any party, including attorneys with valid claims for attorneys' fees, we can certainly understand the Chancellor's impatience with hollow claims, especially in light of the tendency for those claims to consume our limited judicial resources.

Since we find it clear that the Chancellor applied the correct legal standard, this Court must now turn to the secondary question of whether the Chancellor abused his discretion by determining that counsel for the New York litigants were not entitled to a share of the fee award. Juarez and Pezza-Fiorillo's claim that their attorneys are entitled to a portion of the fee award requires an analysis of the impact that the New York litigation had on the settlement of the Delaware Action. The determination of any award is a matter within the sound judicial discretion of the Court of Chancery.[19] A careful study of the record indicates that the Chancellor's decision not to award fees to counsel for the New York litigants is fully supported by the evidence that was before him and that, therefore, he did not abuse his discretion.

We have articulated several factors that the Court of Chancery must consider in determining any award of attorneys' fees. They include: (1) the results accomplished for the benefit of the shareholders; (2) the efforts of counsel and the time spent in connection with the case; (3) the

19. *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 547 (Del. 1998).

contingent nature of the fee; (4) the difficulty of the litigation; and (5) the standing and ability of counsel involved.[20] All of the *Sugarland* factors are contingent upon the benefit at issue being *causally related to the efforts of counsel* in pursuing their action.

A number of factors in the record support the Chancellor's conclusion that counsel for the New York litigants failed to confer a benefit upon the class that would entitle them to an award of attorneys' fees. Because Juarez and Pezza-Fiorillo failed to participate in the Delaware litigation in any meaningful way, any evidence of a benefit must result from the impact of the New York litigation itself. When determining the amount and distribution of an award, the mere pendency of litigation alone does not establish the causal connection between counsel's efforts and changes in the merger terms that benefit the shareholder class. In this appeal, the record is devoid of evidence that the New York litigation in any way influenced the settlement approved by the Court of Chancery.

Juarez and Pezza-Fiorillo conceded at the settlement hearing that their counsel did not take part in any settlement negotiations with the special committee or the directors of the defendant corporations as part of their prosecution of their claims. More importantly, the record belies Appellants claims that they actively pursued the litigation in the New York Supreme Court. The mere fact that Juarez and Pezza-Fiorillo served document requests does not necessarily demonstrate "a seriousness of purpose and an intent to litigate

20. *Sugarland Industries Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980).

hard" that would move the defendants to settlement, as Appellants contend; nor does their briefing and argument of a motion for expedited discovery. When it denied that motion, the New York Supreme Court made clear that it considered the proper forum for resolving this dispute to be the Court of Chancery. This is consistent with our reading of New York case law, which favors the resolution of corporate governance disputes in the state of incorporation, under the "internal affairs doctrine."[21] Although the record does not indicate that there was a formal stay in the New York proceedings, it is clear not only that the case was not actively prosecuted during the existence of the Delaware litigation, but that it presented a threat so insubstantial that it is unlikely to have had meaningful influence on the decision of Viacom and Infinity to settle the Delaware Action. We find that the Chancellor did not abuse his discretion when he denied Juarez and Pezza-Fiorillo's counsel a percentage of the attorneys' fees award under these circumstances.

The judgment of the Court of Chancery is affirmed.

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21. *Hart v. GMC citing Mantei v. Creole Petroleum Corp.*, 402 N.Y.S.2d 822 (N.Y. App. Div. 1978).

APPENDIX B — ORDER AND FINAL JUDGMENT OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE, IN AND FOR NEW CASTLE COUNTY DATED OCTOBER 29, 2001

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Consol. C.A. No. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

ORDER AND FINAL JUDGMENT

The Stipulation and Agreement of Compromise, Settlement and Release, dated February 7, 2001 (the "Stipulation"), of the above-captioned consolidated action (the "Action"), having been presented at the Settlement Hearing on September 25, 2001, pursuant to the Scheduling Order for Approval of Settlement of Class Action entered herein on June 25, 2001 (the "Scheduling Order"), which Stipulation was joined and consented to by all parties to the Action and which (along with the defined terms therein) is incorporated herein by reference; and the Court having determined that notice of said hearing was given in accordance with the Scheduling Order to members of the Class as certified by the Court in the Scheduling Order and that said notice was adequate and sufficient; and the parties having appeared by their attorneys of record; and the attorneys for the respective parties having been heard in support of the settlement of the Action, and an opportunity to be heard having been given to all other persons desiring

to be heard as provided in the notice; and the entire matter of the Settlement having been considered by the Court;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, this 29th day of October, 2001, as follows:

1. The Notice of Pendency of Class Action, Temporary and Proposed Class Action Determination, Proposed Settlement of Class Action, Settlement Hearing and Right to Appear ("Notice to the Class") has been given to the Class (as defined hereinafter), pursuant to and in the manner directed by the Scheduling Order, proof of the mailing of the Notice to the Class was filed with the Court by counsel for Defendants and full opportunity to be heard has been offered to all parties, the Class and persons in interest. The form and manner of the Notice to the Class is hereby determined to have been the best notice practicable under the circumstances and to have been given in full compliance with each of the requirements of Delaware Court of Chancery Rule 23, and it is further determined that all members of the Class are bound by the Order and Final Judgment herein.

2. Pursuant to Court of Chancery Rules 23(a) and 23(b)(1) and 23(b)(2):

a. The Court finds that (i) the Class, as defined below, is so numerous that joinder of all members is impracticable, (ii) there are questions of law and fact common to the Class, (iii) the claims of the plaintiffs are typical of the claims of the Class, and (iv) plaintiffs will fairly and adequately protect the interests of the Class,

b. The Court finds that plaintiffs and their counsel have adequately represented the interests of the Class with respect to the Action and the claims asserted therein;

c. The Court finds that the requirements of Court of Chancery Rules 23(b)(1) and (2) have been satisfied;

d. The Action is hereby certified as a class action on behalf of all record holders and beneficial owners of shares of common stock of Infinity Broadcasting Corporation ("Infinity" or the "Company") (other than Defendants and their "affiliates" and "associates" (as those terms are defined in Rule 12b-2 promulgated under the Securities Act of 1934)) on any day during the period from August 15, 2000 to and including the effective date of the consummation of the Merger, including the legal representatives, heirs, successors in interest, transferees or assigns of all such foregoing holders and owners, immediate and remote (the "Class"); and

e. Plaintiffs are hereby certified as Class representatives and their respective counsel are certified as Class counsel.

3. The Settlement, and all transactions preparatory or incident thereto, are found to be fair, reasonable and adequate and in the best interests of the Class, and it is hereby approved. The parties to the Stipulation are hereby authorized and directed to comply with and to consummate the Settlement in accordance with its terms and provisions, and the Register in Chancery is directed to enter and docket this order and Final Judgment in the Action.

4. This Order and Final Judgment shall not constitute any evidence or admission by any party herein that any acts of wrongdoing have been committed by any of the parties to the Action and should not be deemed to create any inference that there is any liability therefor.

5. The Action is hereby dismissed with prejudice as to all defendants and against plaintiffs and all other members of the Class on the merits without cost except as provided in the Stipulation. All claims, rights, demands, suits, matters, issues or causes of action, whether known or unknown, of plaintiffs and of all members of the Class against all defendants and their respective present or former officers, directors, stockholders, employees, agents, attorneys, representatives, advisors, financial advisors, investment bankers, commercial bankers, lenders, persons who provided fairness opinions, accountants, insurers, trustees, associates, affiliates, parents, subsidiaries (including the directors and officers of such affiliates, parents and subsidiaries), general and limited partners and partnerships, heirs, executors, personal representatives, estates, administrators, successors and assigns (collectively, "Defendants' Affiliates"), whether under state or federal law, including the federal securities laws, and whether directly, indirectly, derivatively, representatively or in any other capacity, in connection with, or that arise out of, any claim that was or could have been brought in the Action, or that arise now or hereinafter out of, or that relate in any way to, the acts, facts, or events alleged in the Action, including without limitation all claims asserted in *Pezza-Fiorillo v. Infinity Broadcasting Corp.*, No. 00/603553 (Sup. Ct. N.Y. Cty.) (Hon. Herman Cahn) and *Juarez v. Infinity Broadcasting Corp.*, No. 00/603524

(Sup. Ct. N.Y. Cty.) (Hon. Herman Cahn), or any action relating in any way to the Proposed Merger, the Merger and any amendment thereto, the negotiation and consideration of the Proposed Merger, the Merger, and any agreements and disclosures relating thereto, any acts, facts, matters, transactions, occurrences, conduct or representations relating to or arising out of the subject matter referred to in the Action, or the fiduciary or disclosure obligations of any of the Defendants (or persons to be released) with respect to any of the foregoing (whether or not such claim could have been asserted in the Action) are hereby compromised, settled, released and dismissed with prejudice (the "Settled Claims"). Dismissal of the Settled Claims with prejudice and on the merits shall become effective immediately upon the entry of this Order and Final Judgment and without any further action by the Court.

6. Plaintiffs' attorneys are hereby awarded fees and expenses in the amount of $2,500,000 in connection with the Action, which fees and expenses the Court finds to be fair and reasonable and which shall be paid to plaintiffs' attorneys in accordance with the terms of the Stipulation. Plaintiffs' Co-Lead Counsel shall allocate such fees and expenses as they deem appropriate.

s/ William B. Chandler
Chancellor

APPENDIX C — TRANSCRIPT OF DECISION OF DELAWARE CHANCERY COURT DATED SEPTEMBER 25, 2001

IN THE COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

C.A. No. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

Chancery Courtroom No. 106
Daniel L. Herrmann Courthouse
Wilmington, Delaware
Tuesday, September 25, 2001
11:09 a.m.

BEFORE: HON. WILLIAM B. CHANDLER, III, Chancellor.

* * *

THE COURT: In the light of what Mr. Abramczyk said at the opening, I'm obviously not going to sign a final order today, but I can give you, tentatively and preliminarily, how I intend to rule. Before I do that, I want to pick up on a theme that was expressed by Mr. Abramczyk in explaining why we would have to perhaps adjourn this hearing.

I'm very impressed that you all are here from New York, and our hearts go out to you. The Delaware bar and the bench have been very concerned about the situation, the tragedy there and in Washington. And if any member of the New

Appendix C

York bar has cases pending in this Court, or any other court in Delaware, I want you to know that we are prepared to work with you to extend deadlines and give you additional time to do those things. I hope you know that already from dealing with the Court and the other courts in Delaware. But we certainly understand the difficult and trying circumstances you are working under, and want you to know that to whatever extent we can be helpful, we want to be.

I have been in touch with people in New York that I know, and tried to be assured about their safety and the safety of their loved ones. I want you to know that we feel for your difficult situation, and we are willing to work with you to help you. The fact that you all travelled here today I really appreciate. I didn't expect it. I didn't think that you would be able to do that, necessarily. If you had asked for a postponement, I certainly would have been trying to find any way possible to accommodate you.

Now, having said that, like Mr. Abramczyk said, since you all made the journey and you have come today, I think you are entitled, at the very least, to know the Court's thinking on the settlement proposal. So I'll turn specifically first to the settlement itself, and the objections that have been lodged to it.

I am required to determine, and I will determine, that this action does meet all the requirements for certification as a class action. I don't believe there are any objections to that, now, either. All of the elements under Rule 23, it seems to me, have been satisfied.

Appendix C

I don't need to go through the elements of typicality, numerosity and the adequacy of representation of these plaintiffs. Although initially challenged, I think to my satisfaction, from the affidavits being filed, there is no question about their adequacy. There is no indication in the record of any conflict that would disable them or disqualify them from being adequate representatives. Likewise, I say the same for counsel to the class.

Then turning to what this Court is obliged to do in approving or passing upon a proposed settlement of an action of this sort, of course the law clearly is that we don't try the merits. We apply our own business judgment to determine whether the settlement appears to be fair, reasonable and adequate. And that requires us to assess in a rough way the nature of the claims that were going to be asserted, and the likelihood they could have prevailed, versus the costs of achieving such a victory, the risks of failure in not being able to achieve a successful resolution in the trial of the action, and other factors, including the time delays of the — of trying the action and ultimately appealing it, and so forth.

This, with a large controlling shareholder deciding to offer a stock-for-stock exchange for the shares — of those shares of stock held by members of the public, there would have been an application of a rigorous standard, the entire fairness standard of review, but I think that given the players involved, the role of the special committee and its advisors, it would have been a rather difficult hill to climb for the plaintiff class in this case.

I don't say that lightly. I do give due credit to the able counsel for the class, who would have surely made heroic efforts in that regard. I still think it would have been not an easy walk — or easy path to walk down. Given that, and given what was at stake, the increase in the exchange ratio, it seems to me, is a reasonable and fair resolution of the claims that are being given up.

Now, the objectors, who — I take at face value and I accept fully that the objectors — Mr. Fernandes is a real shareholder of Infinity, was and has genuine concerns, honestly-held concerns, about the fairness of this settlement. But I think that every stockholder of Infinity, if asked today, "Would you rather have .564 shares of Viacom or would you rather have .592 shares of Viacom," would not take long or hesitate long in making that choice as to which they would prefer. If they were asked, "Do you think it's better for you to have .592 than .564," I think almost to the person they would answer, "Yes, it is."

The difficulty with mergers whose terms don't include collars or floors or ceilings is that you are subjecting yourself to the risks of the market or, as Mr. Abbey said, you are also — there is the possibility, I suppose, of opportunities to gain from it, as well, if the market were to move in that direction. But without collars on either side of that measuring rod, you are subject to the risks of the ups and downs of the market.

Does that mean that that extinguishes the benefit or that one can say this achieved no benefit, there was nothing gained for the stockholders of Infinity when this exchange ratio was increased? Fundamentally, I just don't agree that common sense would lead you to that conclusion. And I respect Mr. Brautigam's

argument, and that of Mr. Fernandes, that they don't believe it has. I'm given some comfort from knowing that a lot of other shareholders apparently feel differently. If they felt it did not achieve some benefit or was not worth something, then I think I would have heard from a far greater number, who clearly have enough voice to make themselves known. I fundamentally can't agree with you, Mr. Brautigam, although I appreciate the nature of the argument. I understand why it's being made for Mr. Fernandes.

I pass over, by the way, entirely the standing argument. I don't think I need to reach it. I'm willing to accept for purposes of argument that Mr. Fernandes has standing. I, rather, think that I just fundamentally disagree with Mr. Fernandes on the core merits of his objection. And that's the only basis upon which I really reject the objection. All the other arguments, I put to one side. I don't need to reach them.

Having said that, then, I'm prepared to approve the settlement, ultimately, when a final order is presented and the necessary time has elapsed to be sure that the notice has been received and any further objections have either not been made, or have been. If they are, then I'll deal with them at that time.

Then I turn next to the fee application, which those of you who know me understand my predilection — I suppose you could put it that way — about this. This is not always an easy aspect of the application. Sometimes they are easy. Sometimes they are harder. I always tend to think about them rather carefully, even when, in instances of this kind, you

have essentially an application that needs to be paid by the defendants, who have volunteered — that's not the right word, but have agreed to pay a certain fee. And that is a fee that is arguably not coming out of the pockets of the stockholders.

I preface that with the word "arguably." One could make the argument that it could have gone into the pocket of stockholders if it had not been negotiated. It does not come, arguably, out of the pocket of the stockholders. One would think that it's — the negotiation that went on between counsel for defendants and counsel for the plaintiff class ought to serve as a rough form of proxy of the fairness and reasonableness of the fee. And that has some intuitive appeal to it.

And one might then say, "Well, Your Honor, why do you need to go any further and think about this at all?" And I have to answer with the only answer that I can come up with for myself, which is because I have a fiduciary obligation to the class. And the Court's obligation to the class is to assure itself that the fee is reasonable and fair, even one that has been negotiated between adversaries, even one that has been agreed to and perhaps has been hard fought. The Court still is a fiduciary for the class. It still must assure itself that it's a fair and reasonable fee.

The other consideration that I think plays into it a bit is there is an ethical obligation for counsel in all cases, but it's perhaps heightened in the class setting, where you don't have real — a chance for clients to sit down with their attorney and negotiate over a fee. There is an ethical obligation under

the rules of professional responsibility for counsel to charge only a reasonable fee for the services they perform. And again, I think the Court is thrust into the position of being, you know, the measuring stick for that, determining whether it is a fair and reasonable fee.

In this case, we use terms that refer to the size of the benefit. We use them somewhat loosely because of the problems I mentioned earlier with defining the benefit, given the fluctuations of the market and being able to assess just how much of a benefit was achieved.

At whatever level of benefit you seem to focus on, in the end, the fee application falls within the range of percentages that we typically refer to. That is anything from 1 percent to 25. Sometimes as high as 30 or 33 percent has even been approved in this Court.

So the fee application here, falling far at the low end of that range, would seem to also serve as reasonable proxy for its fairness or reasonableness.

The other methodology that the Courts sometimes use solely as a crosscheck, and not to itself being a determination of the fee, is the standard hourly rate times the number of hours that were invested in the case, then multiplied by some premium or multiple based on either how hard the case was litigated before it was settled or how great is the benefit that was achieved for the shareholders. And that multiple or multiplier effect can be used to increase the fee over the standard hourly rate times hours worked. We try not to get caught up into that analysis too much, because it can cause

adverse effects if all you are going to focus on is hours invested. But we do use it as a form of crosscheck sometimes.

In this instance, Mr. Abbey makes a compelling argument for me to accept the fee as proposed. And I'm prepared to do that and award the fee as requested, given the factors that I mentioned, the fact that it was negotiated between adversaries, was agreed to be paid by the company, is outside of, technically, the fund that the stockholders receive.

I'm going to award the full amount of the fee because I think it meets all the standards under Sugarland, both in terms of the benefit and the contingency nature of the work, the standing of counsel and the time and effort invested.

The hardest part of the analysis, I suppose, is exactly how much the efforts of counsel contributed or caused the benefit. And that's an angel on the head of a pin that is too fine for me to balance. I simply think that is too difficult to call. Did it contribute 1 percent to the negotiated settlement? Maybe. Did it contribute 50 percent? Maybe. I just can't assess that.

I mean, there was a special committee involved here, and my suspicions are that it played the dominant role in achieving the increase. I mean, I think common sense tells me that's really where the rubber hit the road and that's what got the increase. But that's not what our law requires me to find. I don't have to find that if you didn't play a major role, if you didn't have at least 51 percent of the contributing effect on the sum being reached, that you don't get a fee. The law of Delaware is clear. If it contributed, if it was some causal

factor, played some part, even, of the analysis, you award the fee.

I think there are reasons, policy reasons, for why Delaware law as evolved in that direction, which I need not digress into given that I'm satisfied that all of the factors, as I said, under Sugarland have been satisfied and the fee application is likewise fair and reasonable and should be awarded.

That leaves only one question, which is absolutely the hardest question today for me, which is — Mr. Abbey might be surprised, because he probably thinks it's the easiest question. But it's where you sit. It's where you sit, Mr. Abbey. That is, is there any basis upon which I ought to say that part of this fee ought to be shared with the New York litigation, and the lawsuits that were filed there? That's a much tougher question. And I will confess that I could easily be mistaken in the judgment I have reached on this, but it's my best view of the way I ought to decide that.

Given that lawsuits get filed all over the country — and they get filed in Delaware a lot, but they get filed other places — there is a process by which these cases can be organized. I'm not privy to it. I don't understand it. Sometimes I think I would like to understand it. Other times I'm just as happy not to understand it.

Once in awhile this Court gets confronted with instances where the internal mechanisms haven't worked to resolve those differences over how the litigation ought to be organized and who ought to be lead counsel and the roles of

all the respective counsel. When we have been drawn into it, it's been kicking and screaming, because we don't like to be drawn into it, and we have said as much in both written opinions and decisions from the bench. We have kept you at arm's length and said, "We don't want to know how you work it out, but work it out somehow." In one or two instances, it has not, and the Court has been forced to resolve the differences over how the litigation was going to be organized and how the cases would be consolidated and, procedurally, how they would go forward. There are a couple of opinions. I have written one. Vice Chancellor Strine has done some.

But this wasn't a case where that occurred. This was a case where I was presented with a consolidation order that everyone agreed to, that was in front of me, at least: "This is how the case is going to be consolidated. This is how it's going to be organized. Here are the counsel who are going to prosecute on behalf of the class." That's what I signed off on as an order.

And it's no reflection upon you at all, Mr. Fisher. You have done an excellent job advocating the position that you took up. And I have a great deal of respect for your argument, but in the end, I'm going to award the fee to the class that I certified in this case, and the counsel who were certified.

In the future — this comes as cold comfort, perhaps, but in the future, if agreement can't be reached — Mr. Abbey is saying positions were unreasonable. Maybe they were. Maybe they weren't. I don't know. But in the future — and I might regret saying this. In the future, if there are disagreements of this kind, then the only way you can be assured that I think

you can get your foot in the door here is if you come to the table and argue and put the motion in front of me that you want a position in advancing the cause on behalf of the class, and then let the Court decide how that shakes out and how the case is going to be consolidated and who are going to be the counsel in charge of leading the litigation.

I may very well appoint you lead counsel. Mr. Abbey has been on the short end of that stick in front of me before. He can testify to it, that it can happen that I'm going to choose counsel based on their aggressiveness. And you are saying that you were aggressive in New York. If you had come to me and said, "We are aggressive and we are going to litigate this," and/or Mr. Brautigam had and said, "I'm going to fight because I think we can get more," that might impress a judge on this Court enough to cause that judge to appoint you lead counsel.

So as I said, it may be cold comfort and I regret that in some ways, but I think at this point that's where I have to come out in the end. I'm going to award the full fee to the counsel who were appointed in this case.

So that's my tentative and preliminary ruling. Mr. Abramczyk, Mr. Abbey, whoever, if you want to get me a final order after the deadline or the date has passed, I'll be able to sign it and fax it to you.

Mr. Schulman, I know, will want a transcript of this proceeding, because of the early reference to him being a genius. So the court reporter should get right on that.

Court is in recess.

APPENDIX D — EXCERPTS OF DEPOSITION OF ABBEY GARDY, LLP, BY ARTHUR N. ABBEY DATED AUGUST 21, 2001

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR THE NEW CASTLE COUNTY

CONSOLIDATED
CIVIL ACTION
NO. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

DEPOSITION of ABBEY GARDY, LLP, by ARTHUR N. ABBEY, taken at the offices of Fink & Carney Reporting and Video, 39 West 37th Street, 6th Floor, New York, New York 10018, on Tuesday, August 21, 2001, commencing at 2:05 o'clock p.m., pursuant to Notice, before Ralph Fink, a Certified Shorthand (Stenotype) Reporter and Notary Public within and for the State of New York.

* * *

Q Mr. Abbey, who is your client in this litigation?

A Well, we represent the class of all the Plaintiffs, and I don't know that I know the name, as I sit here today of our client that our firm represents. I am not sure that I recall.

Q So as you —

A There are 11 cases and I know that we are lead counsel for the class along with Milberg Weiss and all those cases were consolidated but, as I sit here today, I don't recollect the name of our client. I haven't looked at that in a long time.

Q Have you represented this client before?

A Since I don't know the name, I can't tell you that.

Q How did this contact come about? Did this client contact you? Did you contact this person?

MS. FISCH: Objection to the form.

MR. BRAUTIGAM: You are right. That is a bad question. Withdrawn.

Q How did your representation of this client, whomever he or she is, come about?

MS. FISCH: Objection to the form.

A I don't know the answer to that.

Q Have any promises been made to the client?

MS. FISCH: Objection to the form.

A Not to my knowledge.

Appendix D

Q Did the client review the Complaint before it was filed?

A I don't know.

Q Did the client review the Complaint or any files at any time?

A I don't know.

Q How many times have you spoken with the client about this case?

A To my knowledge, never.

Q Has the client been consulted on Settlement by you or anyone representing the class?

A Not by me, but I don't know the answer to that question.

* * *

Q How do you believe that your client, whomever he or she is, was notified of the Settlement in this case?

A I don't know. My answer was I don't know whether the client was notified or not.

* * * *

APPENDIX E — EXCERPTS OF DEPOSITION OF STEVEN G. SCHULMAN DATED AUGUST 23, 2001

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR THE NEW CASTLE COUNTY

CONSOLIDATED
CIVIL ACTION
NO. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

DEPOSITION of STEVEN G. SCHULMAN, taken at the offices of Fink & Carney Reporting and Video Services, 39 West 37th Street, 6th Floor, New York, New York 10018 on Thursday, August 23, 2001, commencing at 10:00 o'clock a.m., pursuant to Notice, before Ralph Fink, a Certified Shorthand (Stenotype) Reporter and Notary Public within and for the State of New York.

* * *

Q And there came a time when Settlement negotiations commenced. Is that correct?

A Involving Plaintiffs' counsel?

Q Yes.

A Yes.

Appendix E

Q When was that?

A Well, I don't think you can give a precise date to it.

Q Why not?

A Because the Settlement discussions occurred through a series of discussions over a continuum of time.

Q When was the first time there were Settlement discussions in your view?

A Well, like I said, there was a whole series of discussions, communication, in my view, and as I understand the facts, as recited in the Stipulation of Settlement, and in the Settlement discussions, if only preliminarily, commenced within days or weeks of the commencement of the litigation and it continued throughout months of September and October, 2000. This is what the actual Stipulation of Settlement recites.

Q Were you involved in the Settlement negotiation?

A As allied counsel, with Mr. Abbey and I knew of, or what was directly involved in such discussion.

Although I wasn't a direct participant in such communication, was Mr. Abbey was a direct participation in every such communication but we did obviously definitely as a team.

* * * *

02-510

Supreme Court U.S.
FILED
OCT 31 2002
CLERK OF THE COURT

IN THE

Supreme Court of the United States

SALLY FERNANDES,

Petitioner,

—v.—

VIACOM, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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**Counsel of Record*

33 pp

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STATEMENT OF THE CASE

This shareholder state court class action challenged the fairness of a stock-for-stock acquisition offer by majority shareholder Viacom, Inc. ("Viacom") for the minority public shares of Infinity Broadcasting ("Infinity"). The plaintiffs, minority shareholders of Infinity, claimed that defendants were breaching state law duties of loyalty and care in failing to provide adequate value for the Infinity shares being acquired. The Delaware Court of Chancery consolidated several putative class actions and appointed Milberg Weiss Bershad Hynes & Lerach LLP ("Milberg Weiss") and Abbey Gardy & Squitieri, LLP ("Abbey Gardy") as co-lead counsel, and the Delaware firms of Rosenthal Monhait Gross & Goddess, P.A. and Chimicles & Tikellis as co-liaison counsel.

Thereafter, class counsel reached a settlement with the defendants that resulted in an increase in the compensation paid to Infinity's shareholders as well as other relief. Following notice to the class, the parties presented the settlement to the Court of Chancery at a hearing on the fairness, adequacy and reasonableness of the settlement (Pet. App. at 23a). At the fairness hearing, the Chancellor heard arguments from a class member who opposed the settlement (the petitioner), who filed objections and appeared in court through counsel.[1] Petitioner argued that the increased compensation for class members was illusory, the attorneys' fee was too high, and the representative plaintiffs had not adequately represented the class. The Court of Chancery approved the settlement, holding, *inter alia*, that the class had been adequately represented (Pet. App. at 23a).

---

[1] The original objector was Len Fernandes. After his death, petitioner Sally Fernandes was substituted as the objecting party by order of the Delaware Supreme Court. Fernandes was the sole objector to the settlement.

On appeal, petitioner challenged, among other things, "the Chancellor's determination that the named plaintiffs adequately represented the class as required by Court of Chancery Rule 23(a)(4) and implied in Rule 23.1." (Pet. App. at 8a-9a).[2] The Delaware Supreme Court rejected petitioner's attacks on the representative plaintiffs and their counsel and affirmed the Chancellor's decision.

This petition for a writ of *certiorari* followed.

REASONS FOR DENYING THE PETITION

A. The claimed constitutional issue is not presented on the record.

Petitioner claims that the record of this case raises serious questions as to whether the representation by the named plaintiffs satisfied the requirements of the Due Process Clause. The record in this case demonstrates that there is no substance to this claim.

Petitioner's *entire* reason for asserting that representation of the class was so inadequate as to violate the federal Constitution is found in a few answers culled from the deposition testimony of Arthur Abbey, the senior partner of Abbey Gardy and one of the attorneys for the class, taken after the settlement was entered into and notice disseminated to absent class members. Specifically, petitioner points to Mr. Abbey's testimony that he could not then recall his client's name, had not personally spoken with that individual, and did not specifically know whether the client had been consulted about the settlement. These selections from Mr. Abbey's

---

[2] Delaware Court of Chancery Rule 23 governs class actions in that state. Rule 23(a)(4) requires that the representative plaintiff adequately represent the class. Rule 23.1 governs shareholders' derivative suits. The Delaware Chancery Court rules generally parallel the Federal Rules of Civil Procedure.

deposition testimony, which were already brought to the attention of the Delaware Supreme Court, constitute petitioner's sole basis for requesting review in this Court.

Even examining Mr. Abbey's deposition transcript in isolation from other evidence of record, it is clear that no constitutional issue is presented. Failure to recall a client's name at a deposition taken after the fact does not amount to a constitutional violation. As to the alleged failure to communicate with the client, Mr. Abbey's testimony did not support petitioner's claims. In portions of his deposition not cited by petitioner, Mr. Abbey testified that other lawyers in his firm who he worked with were charged with consulting the client:

> "Q. Who would know the answer to that question [whether the client had been consulted about the settlement]?
>
> A. The people in the firm who normally handle that.
>
> Q. For example, Ms. Fisch?
>
> A. Ms. Fisch, Mr. Gardy, Maybe—there may be others, but I don't know."

(Resp. App. at 1a). Thus, contrary to the implications in the petition, Mr. Abbey *never* testified that his firm's client had not been consulted, but only that he, personally, had not done so. The record evidence does not substantiate the claim that Mr. Abbey's firm, or its client, provided representation for the class that was so inadequate as to raise questions under the Due Process Clause.

Further, in relying on snippets from Mr. Abbey's deposition, petitioner fails to inform the Court of other relevant evidence, presented to the courts below, bearing

on the issue of adequacy of representation. For example, although petitioner faults Mr. Abbey for not knowing whether the client had been consulted about the settlement, the courts below had before them affidavits from each of co-lead counsel's clients stating that he or she approved of the settlement. (Resp. App. at 2a-5a).

Plaintiffs also introduced the declaration of another of plaintiffs' lead attorneys, U. Seth Ottensoser of the Milberg Weiss firm. (Resp. App. at 6a-7a). Mr. Ottensoser testified that:

- his firm had a lawyer-client relationship of many years' standing with representative plaintiff Eugenia Gladstone Vogel;
- he regularly consulted with Ms. Vogel while settlement negotiations were underway;
- he conveyed the terms of the proposed settlement to Ms. Vogel before an agreement in principle was reached;
- he explained events in the litigation to her;
- he advised her of the risks of further litigation;
- Ms. Vogel advised him that she agreed with the terms of the proposed settlement; and
- Ms. Vogel authorized his firm to settle the matter.

Mr. Ottensoser's unrefuted sworn statement establishes that representative plaintiff Vogel provided constitutionally adequate representation to the class. Nothing more was required.

Other evidence presented to the courts below indicates that the litigation and settlement negotiations on behalf of the class were contentious, hard-fought and adversarial. (Resp. App. at 9a-11a, 14a-17a). All class mem-

bers received notice of the proposed settlement and the opportunity to object. At the fairness hearing, counsel introduced evidence indicating that the lead plaintiffs, Infinity shareholders, were adequately informed, consulted, and involved in the litigation process, and that this consultation process included approval of the settlement. (Resp. App. at 2a-7a). The Chancellor was made aware of class counsels' efforts at negotiating a higher price, conducting discovery, retaining expert witnesses, and evaluating complex financial data. (Resp. App. at 9a-17a). In the face of vigorous objection, the Chancellor reviewed the requirements under Delaware's Rule 23, including the requirement of adequate representation, in concluding that the lead plaintiffs and their counsel were adequate and that the class should be certified for settlement purposes under all relevant criteria. (Pet. App. at 18a, 23a). On petitioner's appeal, the Delaware Supreme Court, after full briefing and argument, affirmed the result reached by the Delaware Court of Chancery.

In short, the courts below had before them more than adequate evidence that would support the adequacy of representation under any reasonable interpretation of the Due Process Clause. All the indicia of fair process, including notice and an opportunity to be heard, were satisfied. Petitioner's after-the-fact constitutional objections rest on selective and distorted quotations to the record below. Thus, the facts of record do not raise a substantial federal question.

B. The claimed federal issue was not properly presented to or decided by the courts below.

This Court will generally decline to grant *certiorari* as to issues that have not properly been presented to or decided by the court below. *E.g., Campbell v. Louisiana,*

523 U.S. 392, 401 (1998). In the present case, petitioner's sole basis for claiming that a constitutional issue was raised in the Delaware Supreme Court is a single, uninformative citation in her opening and reply briefs in that court to an earlier Delaware decision, *Prezant v. DeAngelis*, 636 A.2d 915 (Del. 1994).

In her opening brief, petitioner included a quotation from *Prezant* to the effect that "the Due Process Clause of the United States Constitution requires that the named plaintiff at all times adequately represent the interests of the absent class members." This short and ambiguous comment is hardly the kind of argument that would place the Delaware Supreme Court on notice that an important constitutional issue was being submitted for review. The court viewed petitioner's arguments relating to adequacy of representation as a challenge under Delaware's standards for satisfying the requirements of Court of Chancery Rule 23.

Because petitioner's due process arguments were not "properly presented to [ ] the state court," *Adams v. Robertson*, 520 U.S. 83, 86 (1997), the court below was not "fairly put on notice as to the substance of the issue." *Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 469 (2000). Petitioner does not provide this Court with a suitable basis on which to take up and consider the proper standards under the Due Process Clause for assessing adequacy of representation in class action litigation.

C. There is no conflict among the appellate courts justifying review in this Court.

Petitioner's claims of a supposed conflict among the appellate courts are likewise unsubstantiated. The cases cited by petitioner as evidencing a conflict in authorities are not constitutional decisions *at all*. They are decisions by federal appeals courts addressing the adequacy-of-

representation requirements under Federal Rules 23 or 23.1 as they applied in particular factual circumstances. *See Berger v. Compaq Computer Corp.*, 257 F.3d 475 (5th Cir. 2001);[3] *Griffen v. Carlin*, 755 F.2d 1516 (11th Cir. 1985); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454 (9th Cir. 2000); *Lewis v. Curtis*, 671 F.2d 779 (3d Cir. 1982); *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072 (2d Cir. 1995); *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991). These cases are inapposite because they do not decide the constitutional issue on which petitioner seeks review.

Even if the cases cited by petitioner were based on the Due Process Clause instead of the federal class action rule, no conflict would be presented by this case. These

---

[3] Although the Fifth Circuit in *Berger* observed that the adequacy-of-representation requirement has "[c]onstitutional dimensions" which implicate "due process rights," the decision was explicitly based on "whether the court applied the correct legal standard in determining the adequacy of the class representatives *under rule 23*." *Berger*, 257 F.3d at 479 (emphasis added). Petitioner quotes the case as holding that "[The Due Process Clause] require[s] the class representatives to possess a sufficient level of knowledge and understanding to be capable of 'controlling' or 'prosecuting' the litigation." Pet. at 8. The reference to the Due Process Clause in this quotation was added by petitioner and does not accurately describe the opinion of the court. The Fifth Circuit never indicated that these were requirements of constitutional due process. On the contrary, the court made it clear that this standard is an articulation of "*rule 23(a)'s* adequacy requirement," *not* the Due Process Clause. *Berger*, 257 F.3d at 479 n.7 (emphasis added). In other words, by selective quotations and additions of text not found in the Fifth Circuit's opinion, petitioner distorts and contorts an interpretation of the federal rule into a constitutional standard. Whatever the standard articulated in *Berger*, there is no conflict between that case and the decision below. Moreover, upon reconsideration, the Fifth Circuit amended the opinion stating that in enacting the Private Securities Litigation Reform Act of 1995, Congress did not intend to change the adequacy of representation requirement under Rule 23. *Berger* v. *Compaq Computer Corp.*, 279 F.3d 313 (5th Cir. 2002).

decisions were factually specific evaluations of particular facts and circumstances as governed by well-established due process requirements.

In any event, the standards articulated by the courts are not in conflict. For example, petitioner cites *Rand*, 926 F.2d 596, as evidencing a particularly demanding standard for adequacy of representation. The basis for this characterization is a comment in *Rand* to the effect that "the named plaintiff must have *some* commitment to the case, so that the 'representative' in a class action is not a *fictive concept*." *Id.* at 598 (emphasis added). This articulation of the adequacy requirement does not appear stricter than that formulated in the court below and, indeed, might be less demanding.

Accordingly, petitioner fails to identify any conflict in the appellate courts, much less one of sufficient maturity and significance to warrant review in this Court.

D. Petitioner's remaining arguments are insubstantial.

Petitioner's remaining arguments are without merit. She claims, first, that this Court should grant *certiorari* because objectors will rarely have the financial stakes to seek the writ. There is no empirical evidence to support petitioner's contention in this regard.

Petitioner's argument ignores the fact that, although objectors may sometimes lack the financial stakes to seek the writ, objectors' *attorneys* (who, as here, often proceed on a contingent basis) do have the resources and incentives to do so. Petitioner also fails to explain why, if objectors will rarely appeal class action settlement approvals, *she* has chosen to do so—especially since there appears to be nothing about petitioner that would distinguish her from the many other objectors who appear in fairness hearings on class action settlements.

In fact, opponents of class action settlements *have* found the resources to take appeals and other legal challenges, including petitions for *certiorari*. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995). Only this year, this Court held that objectors in federal class actions have standing to appeal even if they do not intervene in the proceedings. *Devlin v. Scardelletti*, 122 S. Ct. 2005 (2002). There is no merit to petitioner's argument that this Court should reach out for the instant case because another may not come along.

Citing nothing but a few newspaper or magazine articles, petitioner also argues that this case somehow presents an issue of national significance. But a computer search of a periodicals database will reveal criticism of almost any feature of modern life. It is hardly surprising, therefore, that some (but clearly not all) commentators criticize aspects of class action practice. Further, the newspaper articles that petitioner cites do not appear directed at the particular issue on which petitioner seeks review—the constitutional standards for adequacy of representation by representative plaintiffs. They appear to be general critiques of class action litigation or attacks on one of the leading firms in the securities class action field, which happens to be co-lead counsel in this case. These do not establish that the decision below presents an issue of overriding public importance. No issues of national significance turn on the resolution of petitioner's objections to the settlement of this routine state law shareholder class action.

Conclusion

The petition should be denied.

Respectfully submitted,

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Delaware Shareholder Plaintiffs
Eugenia Gladstone Vogel and
Anthony Marotta

* *Counsel of Record*

APPENDIX

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR THE NEW CASTLE COUNTY

CONSOLIDATED CIVIL ACTION NO. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

DEPOSITION of ABBEY GARDY, LLP, by ARTHUR N. ABBEY, taken at the offices of Fink & Carney Reporting and Video, 39 West 37th Street, 6th Floor, New York, New York 10018, on Tuesday, August 21, 2001, commencing at 2:05 o'clock p.m., pursuant to Notice, before Ralph Fink, a Certified Shorthand (Stenotype) Reporter and Notary Public within and for the State of New York.

* * *

[7] Q: Who would know the answer to that question?

A: The people in the firm who normally handle that.

Q: For example, Ms. Fisch?

A: Ms. Fisch, Mr. Gardy. Maybe—there may be others, but I don't know.

* * *

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Consolidated Civil Action No. 18219 NC

In re INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

AFFIDAVIT OF ANTHONY MAROTTA

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

Anthony Marotta, being duly sworn, deposes and says:

1. I am one of the plaintiffs in this action. I submit this affidavit in support of class certification and approval of the proposed settlement of this action.

2. At the time of filing of the complaint and at all relevant times through the transaction at issue in the Action, I owned the common stock of Infinity Broadcasting Corporation ("Infinity") and I am a member of the class for which certification is being sought.

3. I have never had any business or social relationship with any of the defendants in the action. My claim is typical of the claims of all holders of the Class A common stock of Infinity and I have no claim or interest of any kind that is adverse to Infinity or holders of its Class A common stock.

4. Based on the foregoing and the reasons stated in the papers submitted in support of the proposed settlement, I believe that the proposed settlement is fair, reasonable and adequate and should be approved by the Court.

/s/ ANTHONY MAROTTA

Sworn to before me this
21st day of September, 2001

/s/ NANCY KABOOLIAN
NOTARY PUBLIC

NANCY KABOOLIAN
Notary Public, State of New York
No. 30-4742784
Qualified in New York County
Commission Expires March 30, 2003

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Consol. C.A. No. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

STATE OF NEW JERSEY)
) ss.:
COUNTY OF BERGEN)

AFFIDAVIT OF EUGENIA GLADSTONE VOGEL

EUGENIA GLADSTONE VOGEL, being duly sworn, deposes and says:

1. I am one of the plaintiffs in the above-captioned action. I make this affidavit in support of plaintiffs' application for approval of the settlement of this class action.

2. I was a holder of Infinity Broadcasting Corporation ("Infinity") stock at the inception of the litigation and held these shares throughout the class period. I am a

member of the class for which certification is being sought.

3. I have never had any business or social relationships with any of the defendants, and I have no claim or interest that is adverse to Infinity or its public shareholders.

4. For the reasons stated in the papers submitted in support of the proposed settlement, I believe that the proposed settlement is fair, reasonable and adequate, and should be approved by the Court.

/s/ EUGENIA GLADSTONE VOGEL
Eugenia Gladstone Vogel

Sworn to before me this
14th day of September, 2001

/s/ GILBERT DOMINGUEZ
Notary Public

GILBERT DOMINGUEZ
A Notary Public of New Jersey
My Commission Expires Dec. 15, 2003

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CONSOL. C.A. No. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

DECLARATION OF U. SETH OTTENSOSER

I, U. SETH OTTENSOSER, hereby declares under penalty of perjury as follows:

1. I am associated with the law firm of Milberg Weiss Bershad Hynes & Lerach LLP, one of plaintiffs' Co-Lead Counsel in the above-referenced case (the "Action").

2. My firm has represented Eugenia Gladstone Vogel ("Ms. Gladstone Vogel") for many years and I have worked directly on several of those matters.

3. While the negotiations in this Action were ongoing, I regularly consulted with Ms. Gladstone Vogel. Before an agreement in principle on settlement terms was reached, I conveyed the proposed terms to Ms. Gladstone Vogel, explained events in the litigation to her and advised her of the risks of further litigation. Ms. Glad-

stone Vogel advised me that she agreed with the terms of the proposed settlement and authorized Milberg Weiss to settle the matter.

4. During the course of the Action, I worked closely with Steven G. Schulman of my office, and advised him of my litigation-related activities and communications with Ms. Gladstone Vogel.

Sworn to on this 20th day
of September, 2001
New York, New York

/s/ U. SETH OTTENSOSER
U. SETH OTTENSOSER

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

C.A. No. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

Chancery Courtroom No. 106
Daniel L. Herrmann Courthouse
Wilmington, Delaware
Tuesday, September 25, 2001
11:09 a.m.

BEFORE: HON. WILLIAM B. CHANDLER, III, Chancellor.

SETTLEMENT HEARING

APPEARANCES: NORMAN M. MONHAIT, ESQ.
Rosenthal, Monhait, Gross & Goddess

—and—

ARTHUR N. ABBEY, ESQ.
KARIN E. FISCH, ESQ.
of the New York Bar
Abbey Gardy, LLP.

—and—

STEVEN G. SCHULMAN, ESQ.
U. SETH OTTENSOSER, ESQ.
of the New York Bar
Milberg Weiss Bershad Hynes & Lerach
for the Plaintiffs

---

[8] MR. ABBEY: When we started the action in August and in September, there were discussions that I personally had with Mr. Baskin, the partner in charge of the matter at Shearman & Sterling. He represented Viacom. We indicated to him that we thought that the .564 offer was inadequate. At the same time, the [9] plaintiffs retained an expert to assist them in evaluating the offer. And that's Mr. Wilbur Ross, of WL Ross. There is an affidavit on file from him.

During the period August, September and through mid-October, we received documents to review from the defendants. And as October started to move along, in the middle of October, the defendants decided to share with us the work that was done by their financial advisors; not only the financial advisors for the special committee, but the financial advisors for Viacom, as well. These were detailed financial analyses, determining what an

appropriate exchange ratio would be. That was followed by high level meetings on October 25th and October 26th in New York, attended by attorneys, bankers and other experts.

As a result of those extensive meetings in New York, where we shared ideas and we told the defendants that we thought the .562 was—.564 was inadequate, on October 27th, after much discussion—these dates are important in connection with the objection. On October 27th, I informed Mr. Baskin, on behalf of all of the plaintiffs, that the .592—an increase from .564 to .592 would be [10] satisfactory.

It is absolutely true that during the course of the discussions prior to that we tried to get a higher number. We talked about numbers that began with a .6. We were told that was not in the cards; the highest that they could go would be from .564 to .592. At the time, that represented an increase of approximately 5 percent. It amounted to $1.50 a share for each Infinity share, and collectively, on the 391 million shares, $1.50 increase at the time amounted to approximately $600 million. We were told that the reasons, among others, for why Viacom would not go higher at that point in time was because the stock of Infinity in that period prior to August 14th—there were rumors around that Viacom might be interested in buying the rest of Infinity. As a result, Infinity was trading not so much necessarily on the fundamentals of itself, but also on the fact that there might be a takeout by Viacom of the Infinity stock.

And all of that was taken into account by our expert. We reviewed the work of the special committee. We reviewed Goldman Sachs' financial analysis. We did agree, and I agreed, on [11] October 27th.

At the same time that we were doing our negotiations, on a parallel track the special committee, its financial

advisors and its lawyers, were also discussing the transaction. I will tell you that when we met with the counsel for the special committee and counsel for Viacom, both on the 25th and 26th of October, we were told, yes, there were discussions going on, but there were absolutely no agreements between the special committee and Viacom as to what an appropriate price would be. The number .592 had been discussed between the special committee at that time, but it was subject to—and it had not occurred until October 30th, three days later. It was subject to an opinion of the bankers, saying that .592 was fair. It was also subject to the Infinity board meeting and approving.

That was done. That was done on the morning of October 30th. An oral opinion was given by the special committee's bankers that the price was fair. And on the evening of October 30th, Viacom's board met and approved an increase in the exchange ratio from .564 to .592.

All of that, Your Honor, occurred [12] three days after we had agreed that we would accept .592. And so I raise that because there is some, in the papers of the objectors, question that as of October 23—even though there had been discussions between the special committee and Viacom as to increasing the exchange ratio to .592, I will tell you that we were expressly told there was no deal at .592. But at any event, at .592 it required approval of the bankers and the Viacom board, and the public documents indicate that did not occur until October 30th.

Again, I point out there was no deal between the special committee and Viacom on October 23rd. It did not occur until October 30th. Indeed, the merger agreement itself was dated October 30th. Could not have been an agreement at .592 until the merger agreement had been signed by both sides.

Now, we have been given credit for participating. This is a shared-credit case. The settlement agreement says, and says it in bold print, that the litigation was a positive factor in increasing the merger consideration.

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR THE NEW CASTLE COUNTY

CONSOLIDATED CIVIL ACTION NO. 18219

IN RE INFINITY BROADCASTING CORPORATION
SHAREHOLDERS LITIGATION

DEPOSITION of STEVEN G. SCHULMAN, taken at the offices of Fink & Carney Reporting and Video Services, 39 West 37th Street, 6th Floor, New York, New York 10018, on Thursday, August 23, 2001, commencing at 10:00 o'clock a.m., pursuant to Notice, before Ralph Fink, a Certified Shorthand (Stenotype) Reporter and Notary Public within and for the State of New York.

* * *

[82] Q Okay. After the cases were consolidated on or about August 30th of 2000, what, if anything, was done with respect to this litigation?

A The Plaintiffs' counsel continued their factual investigation, retained independent financial advisor, and served documents requests and commenced discussions with Viacom counsel about the perception that the .564 was an inadequate price.

Q Let's take—

A Those are the primary things that I recall. There obviously may have been others.

[83] Q Okay. How did lead counsel, on August 30th of 2000 continue the factual investigation? What was done?

A We continued our review of publicly available materials. We consulted with our financial advisor, and drew on his expertise.

And, again, then I would recall that we made requests in addition to formal requests, for documentary information from the Defendants or their counsel. And this is how it was begun.

Q Mr. Schulman, I was going to ask you that you continue on, if you want, I guess that is fair and I will continue.

With respect to the document request, did you receive documents from the Defendants?

A Yes, we did on a number of occasions.

* * *

[114] Q When was the first time there were Settlement discussions in your view?

A Well, like I said, there was a whole series of discussions, communication, in my view, and as I understand the facts, as recited in the Stipulation of Settlement, and in the Settlement discussions, if only preliminarily, commenced [115] within days or weeks of the commencement of the litigation and it continued throughout months of September and October, 2000. This is what the actual Stipulation of Settlement recites.

Q Were you involved in the Settlement negotiation?

A As allied counsel, with Mr. Abbey and I knew of, or what was directly involved in such discussion.

Although I wasn't a direct participant in such communication, was Mr. Abbey was a direct participation in every such communication but we did obviously definitely as a team.

Q Okay. You now talked about this continuum.

Can you discuss with specificity when the first conference in this continuum took place?

A I cannot specify, but I believe generally we began to communicate our concerns about the .564 obviously with challenge in the Complaints, so I will consider for the first hostile communication by us.

[116] In the sense that, of attacking the transaction. Not in the sense of going to war, obviously.

The discussion of the possibilities of an enhancement, I think, was undertaken by Mr. Abbey or by myself beginning of September, 2000.

* * *

[121] Q Mr. Schulman, at some point you on behalf of the class informed Mr. Baskin that you had some trouble with .564 exchange ratio.

Is that fair?

A I believe that I, as a representative of my firm, which is a court appointed lead counsel, stated to Mr. Baskin in no uncertain terms that our assessments that the .564 was inadequate and should be changed to make it greater.

* * *

[175] Q What documents did you see that supported that position?

A The materials that were exchanged between the parties of the investment bankers which I indicated before

I couldn't discuss in detail, it was the case at the meeting, which I knew occurred the day before more, I think more significantly there were candid discussions. This occurred on the 26th. They were candid, high level discussion completely open, between us and the representatives of Deutsche Bank, Bear Stearns and as to their analyses, and our perspective on those analyses, and based on that dialogue which I think took place over hours, we were of the view that to say .6 or better was a very reasonable demand, a demand, for purposes of resolving the litigation.

Q Did you testify in that answer about [176] the content of the October 25, 2000?

A I knew there then had been general discussion between the representatives of the Viacom investment banker and our people and had a general sense that the Viacom representatives at that time felt that 564 was a fair price. And had defenses to that price. So they felt strongly.

This was my impression, that they felt strongly, that that price was a good one, particularly in light of the negative trend in the radio industry, between April and August and October, which in their view diminished the value of Infinity. There was their view.

So then when we discussed with Special Committee the views, which, of course, you know, we, being more inclined, we will hope, towards increasing the price and which we reviewed their material and we learn about the various arguments and Colorado or argue about the change, when we had the benefits of Mr. Ross' input and we talked all through, it was our professional judgment, in our experience and our knowledge of the law, and our knowledge of the facts, that a very smart proposal was to say, in light of all [177] that was going on then, we want to see a number with a 6 in front of it.

That was our position, that was our negotiating posture. That was the demand we made, as a result of all these exchanges that occurred.

Q When that was said on behalf of Plaintiffs, were you expecting a range of between .564 and .6?

A No. Obviously we rejected 564.

So we couldn't have accepted 564 as being any acceptable range.

We simply said that it should be .6 or higher. And this was our negotiating demand period, end of story.

(3)

Supreme Court, U.S.
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No. 02-510

IN THE

Supreme Court of the United States

SALLY FERNANDES,

Petitioner,

v.

VIACOM, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Delaware

CERTAIN RESPONDENTS' BRIEF IN OPPOSITION

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* Counsel of Record

October 31, 2002

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QUESTION PRESENTED

Whether, in the circumstances of the case presented for review, the named plaintiff adequately represented the class as required by the Due Process Clause of the United States Constitution.

RULE 29.6 STATEMENT

No publicly-held corporation owns more than 10% of the stock of Respondent Viacom Inc. ("Viacom"). National Amusements, Inc. is a closely-held corporation that beneficially owns approximately 68% of Viacom's Class A Common Stock (voting stock) and approximately 11% of Viacom's Class A Common Stock and Class B Common Stock (non-voting stock) on a combined basis. Respondent Infinity Broadcasting Corporation ("Infinity") is a wholly-owned subsidiary of Viacom.

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STATEMENT OF THE CASE

Petitioner Sally Fernandes asks this Court to review a factual determination made by the Delaware Court of Chancery and affirmed by the Supreme Court of Delaware—*i.e.*, that the lead plaintiffs and their counsel adequately represented a class of stockholders in settling claims challenging Viacom's tender offer for the shares of Infinity that it did not already own. Respondents respectfully request that this Court deny the petition for writ of certiorari.

Background—The Transaction and the Class Actions.

On August 15, 2000, following Viacom's announcement that it would offer 0.564 shares of its Class B common stock for each share of Infinity's common stock, plaintiff Eugenia Gladstone Vogel filed in the Delaware Court of Chancery one of eleven putative class action lawsuits seeking to enjoin Viacom's acquisition of the Infinity shares. Pet. Ap. A at 2a. None of those lawsuits was filed by petitioner, who did not own shares of Infinity at the time. On August 31, 2000, the Court of Chancery consolidated the eleven class actions under the first-filed action brought by plaintiff Vogel, and appointed the law firms of Milberg Weiss Bershad Hynes & Lerach, LLP and Abbey Gardy & Squiteri LLP as co-lead counsel. Resp. Br. App. A.

In September and October of 2000, plaintiff's co-lead counsel conducted document discovery and engaged a financial advisor to assist them in analyzing the fairness of the proposed acquisition to the members of the class. In addition, co-lead counsel discussed with Viacom's counsel a possible settlement of the consolidated class action if the exchange ratio were increased. On October 30, 2000, the parties reached an agreement in principle to settle the consolidated stockholder action based upon an increase in the exchange ratio. The agreement was subject to, among other things, completion of discovery by class counsel confirming

the fairness of the settlement and approval of the settlement by the Court of Chancery.

The Petitioner Purchased Infinity Stock After the Class Actions Were Settled.

On November 17, 2000—*after* the parties had agreed to settle the consolidated class actions based upon an increase in the exchange ratio, *after* the settlement was of public record, and *after* Viacom and Infinity announced that they had executed a definitive merger agreement—petitioner's son purchased 25 shares of Infinity common stock for an account that he jointly maintained with petitioner, his mother. Nearly two months later, on January 11, 2001, petitioner's counsel moved to intervene in the consolidated class action for the purpose of objecting to the settlement. Pet. at 3. No other shareholder objected to the settlement.

The Courts Below Found That The Class Representative Was Adequate.

On September 25, 2001, following notice to the class, the Chancellor held a hearing on the proposed settlement. Petitioner's counsel submitted a brief, appeared at the hearing, and submitted oral argument in opposition to the settlement and the fee petition presented by co-lead counsel. At the conclusion of the hearing, the Chancellor ruled that the consolidated action met the requirements for class certification, specifically noting that the adequacy of representation requirement had been met:

> Although initially challenged, I think to my satisfaction, from the affidavits being filed, there is no question about their adequacy. There is no indication in the record of any conflict that would disable them or disqualify them from being adequate representatives. Likewise, I say the same for counsel to the class.

Petition, Ap. C at 23a. The Chancellor held that the increase in the exchange ratio was "a reasonable and fair resolution of

the claims that are being given up," and approved the settlement. Pet. Ap. C at 30a.

On November 27, 2001, petitioner's counsel filed a notice of appeal in the Supreme Court of Delaware, challenging the settlement on a number of grounds, including the adequacy of the exchange ratio and of the Chancellor's determination that the named plaintiffs and their counsel adequately represented the class. The Supreme Court of Delaware considered petitioner's brief and oral argument on those issues, and, as to the adequacy of the class representative, explicitly held:

> We have held that the Court of Chancery's determination of the adequacy of a class representative is an "essential component" of the settlement approval process. The Chancellor clearly addressed this issue both from the bench and in his final order approving the settlement, explicitly stating that the shareholder class had been adequately represented. Although Fernandes cites deposition testimony taken from class counsel that suggests limited contact and substantially passive involvement by certain named plaintiffs, a nominal plaintiff's lack of personal familiarity with an action is not determinative of that representative's adequacy. Our case law requires little more than that a representative be generally familiar with the litigation. Indeed, our legal system has long recognized the appropriateness of an attorney taking the dominant role in derivative proceedings. Therefore, the mere fact that class counsel undertook the dominant role in this litigation in no way suggests that the class representatives must be found to have inadequately represented the class. We find that sufficient evidence exists in the record to support the Chancellor's conclusions on the adequacy of the named plaintiffs' representation.

Pet. Ap. A at 9a (citations in footnotes omitted).

Here, petitioner has not challenged the fairness of the settlement. She seeks review solely on the question of whether the class representative and co-lead counsel adequately represented the class in accordance with the requirements of the Due Process Clause of the United States Constitution. For the reasons set forth below, the petition should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

The Delaware Courts Fully Considered And Properly Determined That The Plaintiff Adequately Represented The Class.

Although petitioner argues that a writ of certiorari should be granted to resolve a dispute among federal appellate courts concerning the standard by which the adequacy of a class representative is to be measured, in reality there is no such dispute and the petition simply presents for review a narrow issue of fact that was properly decided by the Delaware Court of Chancery and affirmed by the Supreme Court of Delaware.

Contrary to petitioner's argument, there is no split among the federal circuits as to the standards that are applied to determine the adequacy of a class representative. All courts recognize the importance of determining the adequacy of the class representative to ensure that due process is afforded to absent class members. In doing so, the lower courts review the factual record to ensure that: (1) the interests of the class representative are not antagonistic to the other members of the class; and (2) the class is represented by competent counsel. *See, e.g.*, 5 Moore's Federal Practice § 23.25[3][a] (3d ed. 1997); *In re Fuqua Industries, Inc. S'holder Litig.*, 752 A.2d 126, 132-33 (Del. Ch. 1999) (noting that the requirements that: (a) the plaintiff not have interests antagonistic to those of the class; and (b) the plaintiff's attorney be qualified, experienced and generally able to conduct the proposed litigation are sufficient to have adequate representation). Although petitioner's counsel suggests that

the circuit courts may differ on the question of who bears the burden of proof where the adequacy of a class representative is questioned, that question is not raised here. *See* Pet. at 7-8; 5 Moore's Federal Practice § 23.25[3][c] ("Courts have disagreed as to which party has the burden on proving adequacy of representation under Rule 23 (a)(4) . . . .").

There is no question that the determination of the adequacy of a class representative is a factual issue that depends upon the circumstances of each case and is only reversed for abuse of discretion. *See, e.g.*, 5 Moore's Federal Practice § 23.25[3][b]; Wright & Miller, Federal Practice and Procedure: Civil 2d § 1765 at p. 271 (2d ed. 1990). In this case, the Delaware Court of Chancery expressly recognized and fulfilled its obligation to ensure that the due process requirements embedded in Rule 23 of the Court of Chancery Rules were met. Pet. Ap. C at 22a-23a. The Chancellor reviewed the factual record before him, including briefs, oral argument and affidavits, which showed that: (1) the lead plaintiffs' interests were aligned with the members of the Class;[1] and (2) that plaintiffs' co-lead counsel were experienced and fully represented the interests of the class. Pet. Ap. C. at 23a.

In determining the adequacy of the class representative, the Chancellor expressly considered and rejected petitioner's argument that the named plaintiff did not adequately represent the class "because he was not involved in settlement

---

[1] Petitioner herself would likely have failed to qualify as an adequate class representative because she purchased shares *after* the tender offer was announced and *after* settlement had been reached. *See Leighton v. Lewis*, 577 A.2d 753 (Del. 1990) (Table) (affirming Court of Chancery decision that plaintiff lacked standing to intervene where plaintiff did not buy stock until after the alleged wrongdoing had occurred). The Court of Chancery did not find it necessary to reach the standing issue here, however, in approving the settlement because it treated petitioner as if she had standing for purposes of deciding the objection.

discussions, but instead was 'notified' about the settlement at the time it was reached."[2] Pet. at 4. As the Chancellor noted, the sworn testimony submitted by plaintiffs' co-lead counsel in support of the settlement specifically stated that in this case:

- lead counsel regularly consulted with the lead plaintiff;
- lead counsel discussed the proposed terms of the settlement with the lead plaintiff *before* an agreement in principle on the terms of the settlement was reached; and
- the lead plaintiff authorized counsel to settle the litigation on the proposed terms.

Pet. Ap. C at 23a; *See also* Resp. Br. App. B.

Thus, the very factual predicate of the petition is incorrect. The courts below did *not* find (much less approve) that co-lead counsel failed to inform or involve their client in the litigation until after a settlement was reached.

Moreover, in reviewing the issue of the adequacy of representation on appeal, the Supreme Court of Delaware expressly recognized (in portions of its opinion that petitioner omitted from the quotations in her petition) that:

- the Court of Chancery's determination of the adequacy of a class representative is an "essential component" of the settlement process;[3]

---

[2] Petitioner's argument that the class representative was inadequate because one of the lawyers serving as co-lead counsel (Arthur N. Abbey) did not personally speak with the lead plaintiff is specious. Here, the record is unrefuted that a lawyer from the other firm serving as co-lead counsel had regular, direct contact with the lead plaintiff, who was briefed on the terms of the proposed settlement *before* an agreement in principle on settlement terms was reached. *See* Resp. Br. App. B.

[3] Pet. Ap. A at 9a (citing *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039, 1045 (Del. 1996)).

- the Chancellor clearly addressed the adequacy of representation issue both from the bench and in his final order approving the settlement explicitly stating that the shareholder class had been adequately represented; and
- sufficient evidence exists in the record to support the Chancellor's conclusions on the adequacy of the named plaintiffs' representation.

Pet. Ap. A at 9a-10a.

Thus, the Supreme Court of Delaware determined that the Court of Chancery properly applied the standard for determining the adequacy of the class representative in accordance with the requirements of the Due Process Clause. That is all that the Delaware courts were required to do. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982) ("state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed for federal law").

Here, the absent class members' due process rights were appropriately protected by the Court of Chancery's careful review and approval of the settlement. Regardless of whether some courts have placed more or less emphasis on the level of knowledge of the named plaintiff in making *factual determinations* concerning the adequacy of a class representative, in this case the Delaware Court of Chancery expressly found, and the Supreme Court of Delaware affirmed, that the class representative had sufficient involvement in the proceedings to adequately function as the class representative. As this Court stated in *Hansberry v. Lee*, "there has been a failure of due process only in those cases where it cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it." 311 U.S. 32, 42 (1940). In this case, the procedure followed by

the Delaware Court of Chancery and affirmed by the Supreme Court of Delaware ensured the protection of absent parties and need not be addressed on appeal to this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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*Counsel of Record

October 31, 2002

APPENDIX A

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

C.A. No. 18219-NC

EUGENIA GLADSTONE VOGEL,
Plaintiff,

v.

DAVID T. MCLAUGHLIN, *et al.*,
Defendants.

C.A. No. 18220-NC

ANTHONY MORATTA,
Plaintiff,

v.

INFINITY BROADCASTING CORPORATION, *et al.*,
Defendants.

C.A. No. 18221-NC

DEBECCA SIEGEL,
Plaintiff,

v.

MEL KARMAZIN, *et al.*,
Defendants.

C.A. No. 18224-NC

ANNE KLEIN,

Plaintiff,

v.

INFINITY BROADCASTING CORP., *et al.*,

Defendants.

C.A. No. 18227-NC

JOAN OTTO, FRANK PERNICE, VIRGINIA ROSENBERGER, LEONARD GANZ, LAUREN CAREY, SAM WIECHNER, CLAIRE RAND and PALMETTO PARTNERS LP,

Plaintiffs,

v.

DAVID T. MCLAUGHLIN, *et al.*,

Defendants.

C.A. No. 18228-NC

NALINE YASSIN,

Plaintiff,

v.

INFINITY BROADCASTING CORPORATION, *et al.*,

Defendants.

C.A. No. 18230-NC

YEHUDA GLATZER,

Plaintiff,

v.

DAVID T. MCLAUGHLIN, *et al.*,

Defendants.

C.A. No. 18231-NC

HOWARD GUNTY PROFIT SHARING PLAN,

Plaintiff,

v.

GEORGE H. CONRADES, *et al.*,

Defendants.

C.A. No. 18237-NC

HOWARD L. MILKIS,

Plaintiffs,

v.

DAVID T. MCLAUGHLIN, *et al.*,

Defendants.

C.A. No. 18241-NC

MICHAEL SHAW,

Plaintiff,

v.

DAVID T. MCLAUGHLIN, *et al.*,

Defendants.

C.A. No. 18257-NC

MIKE TAYLOR,

Plaintiff,

v.

DAVID T. MCLAUGHLIN, *et al.*,

Defendants.

ORDER OF CONSOLIDATION

It appearing that the above-captioned actions involve the same subject matter, and that the administration of justice would be best served by consolidating the actions.

IT IS, this 31st day of August. 2000, ORDERD AS FOLLOWS:

1. The above-captioned actions shall be consolidated for all purposes.

2. Hereafter, papers need only be filed in Civil Action No. 18219-NC.

3. The caption of the consolidated action shall be as follows:

4. The law firms of MILBERG WEISS BERSHAD HYNES & LERACH, LLP, One Pennsylvania Plaza, New York, NY 10119; ABBEY GARDY & SQUITIERI, LLP, 212 East 39th Street, New York, NY 10016; BULL & LIPSHITZ LLP, 246 West 38th Street, New York, NY 10018; CHIMICLES & TIKELLIS LLP, One Rodney Square, Wilmington, DE 19801; WOLF HALDENSTEIN ADLER FREEMAN HERZ, 270 Madison Avenue New York, NY 10016; WOLF POPPER LLP, 845 Third Avenue, New York, NY 10022; LAW OFFICES OF JAMES V. BASHIAN, P.C., Suite 2700, 500 Fifth Avenue, New York, NY 10110; SCHIFFRIN & BARROWAY, LLP, Suite 400, Three Bala Plaza East, Bala Cynwyd, PA 19004; CAULEY & GELLER, LLP, One Boca Place, Suite 421A, 2255 Glades Road, Boca Raton, FL 33431; ZWERLING SCHACHTER & ZWERLING LLP, Suite 2200 767 Third Avenue, New York, NY 10017; STULL STULL & BRODY, 6 East 45th Street, New York, NY 10017; GOODKIND LABATON RUDOFF & SUCHAROW LLP, Suite 1200, 100 Park Avenue, New York, NY 10017-5563; WECHSLER HARWOOD HALEBIAN & FEFFER LLP, 488 Madison Avenue, New

York, NY 10022; FARUQI & FARUQI LLP, 320 East 39th Street New York, NY 10016; BERNSTEIN LIEBHARD & LIFSHITZ LLP, 10 East 40th Street, New York, NY 10016; STULL STULL & BRODY, 6 East 45th Street, New York, NY 10017; WEISS & YOURMAN, Suite 1600, 551 Fifth Avenue, New York, NY 10176; BERGER & Montague, P.c. 1622 locust Street, Philadelphia, PA 19103; LAW OFFICES OF CURTIS V. TRINKO, LLP, 16 West 46th Street, 7th Floor, New York, NY 10036 and LAW OFFICES OF WALLACE A. SHOWMAN, P.C. Suite 2900, 1350 6th Avenue, New York, NY 10019 shall constitute plaintiffs' Committee of the Whole.

5. The Law firms of MILBERG WEISS BERSHAD HYNES & LERACH, LLP and ABBEY GARDY & SQUITIERI, LLP are hereby designated as plaintiffs' Co-Lead Counsel. The law firms of ROSENTHAL MONHAIT GROSS & GODDESS, P.A., Suite 1401, Mellon Bank Center, Wilmington, Delaware 19899 and CHIMICLES & TIKELLIS LLP, One Rodney Square, Wilmington, Delaware 19801 are hereby designated as Delaware Co-Liaison Counsel for plaintiffs.

6. All documents previously served and filed to date in any of the cases consolidated herein are deemed a part of the record in the consolidated action. The Complaint filed in Civil Action No. 18219 NC is hereby designated as the operative complaint in the consolidated action. Defendants need not respond to the complaints heretofore filed in the other constituent actions.

7. Plaintiffs' Lead Counsel shall set policy for plaintiffs for the prosecution of this litigation, delegate and monitor the work performed by plaintiffs' attorneys to ensure that there is no duplication of effort or unnecessary expense, coordinate on behalf of plaintiffs the initiation and conduct of discovery

proceedings, and provide supervision and coordination of the activities of plaintiffs' counsel.

/s/ William B Chandler
WILLIAM B. CHANDLER

APPENDIX B

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

CONSOL C.A. No. 18219

IN RE INFINITY BROADCASTING CORPORATION SHAREHOLDERS LITIGATION

DECLARATION OF U. SETH OTTENSOSER

I, U. SETH OTTENSOSER, hereby declares under penalty of perjury as follows:

1. I am associated with the law firm of Milberg Weiss Bershad Hynes & Lerach LLP, one of plaintiffs' Co-Lead Counsel in the above-referenced case (the "Action").

2. My firm has represented Eugenia Gladstone Vogel ("Ms. Gladstone Vogel") for many years and I have worked directly on several of those matters.

3. While the negotiations in this Action were ongoing, I regularly consulted with Ms. Gladstone Vogel. Before an agreement in principle on settlement terms was reached, I conveyed the proposed terms to Ms. Gladstone Vogel, explained events in the litigation to her and advised her of the risks of further litigation. Ms. Gladstone Vogel advised me that she agreed with the terms of the proposed settlement and authorized Milberg Weiss to settle the matter.

4. During the course of the Action, I worked closely with Steven G. Schulman of my office, and advised him of my litigation-related activities and communications with Ms. Gladstone Vogel.

Sworn to on this 20th day of September, 2001
New York, New York

/s/ U. Seth Ottensoser
U. SETH OTTENSOSER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of September, 2001, copies of the foregoing Declaration Of U. Seth Ottensoser were served, by hand delivery, upon:

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